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Supreme Court, U.S.
FILED

No. ___

04-921 JAN 4 - 2005

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IN THE

Supreme Court of the United States

BICYCLE COMPONENTS EXPRESS, INC.
d.b.a. SOLEUS

Petitioner,

v.

BRUNSWICK CORPORATION, BRUNSWICK BICYCLE,
and DOES 1-50,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner was deprived of Procedural and Substantive Due Process of Law under the Fourteenth Amendment when Petitioner had alleged in its Second Amended Complaint that it had *fully performed* its obligations pursuant to an oral contract with Respondents. The allegation is deemed *admitted* on Motions to Dismiss under Illinois §§ 2-619(a)(7) and § 2-615 when the trial court, affirmed by the Illinois Court of Appeal and the Supreme Court, resolved the question of fact that Petitioner had not *fully performed* its obligations under the contract, thereby resulting in the Complaint being dismissed as unenforceable under the statute of frauds.

2. Whether Petitioner was deprived of Procedural and Substantive Due Process of Law under the Fourteenth Amendment when Petitioner had alleged an existing partnership between the Petitioner and the Respondents in the Second Amended Complaint no less than 14 times and that the Petitioner *"expected a Special Relationship of Trust"* between the parties and when the Illinois courts ignored the fiduciary relationship and dismissed the Second Amended Complaint, denying that Respondents had a duty to disclose its business plans to the Petitioner.

3. Whether Petitioner was deprived of Procedural and Substantive Due Process of Law under the Fourteenth Amendment when the Illinois courts denied Petitioner the *liberty of contract* when the oral contract could have been entered into in California, in Taiwan, in Nevada, in Pennsylvania or in Mexico, and when it would have been a valid contract in any of those jurisdictions.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

STATEMENT PURSUANT TO RULE 29.6

Bicycle Component Express (BCE) is a privately-owned company. No publicly-held company owns 10% or more of any of Bicycle Component Express, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Illinois Supreme Court for a hearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2101, 2104, and 2106.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14, § 1.

STATEMENT OF THE CASE

Petitioner Bicycle Components Express, Inc., d/b/a Soleus ("BCE"), brought suit against Respondent Brunswick Corporation asserting causes of action for breach of contract, equitable estoppel, "quantum meruit and/or substantial performance," and "fraud and deceit."

Brunswick moved to dismiss BCE's three complaints in this matter through motions pursuant to 735 ILCS 5/2-619.1 ("Section 2-619.1") and 735 ILCS 5/2-615 ("Section 2-615"), the failure to state a claim and also on the basis that any purported oral agreement was unenforceable under the statute of frauds, pursuant to 735 ILCS 5/2-619(a)(7) ("Section 2-619(a)(7)").

Petitioner alleged that it had *"fully performed"* its obligations under the Oral Agreement, which allegation is deemed *"admitted"* under the Motions to Dismiss. When the Trial Court questioned that allegation by saying, "The question is, is this *full performance* . . . ," the Illinois Court was making a Finding of Fact that this was not "full performance," which, under Illinois law, is required to get around the Statute of Frauds. In addition, the Illinois courts ignored the allegations of a partnership (14 times) in the Second Amended Complaint and the resultant fiduciary relationship between the Petitioner and Brunswick Corporation. Respondent, therefore, had a duty "to disclose its business plans to [Petitioner]." (Issue No. 5, Respondent's Brief on Appeal, p. 2.)

Finally, Petitioner was deprived of its *"liberty of contract"* when the Illinois courts ruled against the oral contract and when it would have been considered a valid contract in every other possible jurisdiction. Petitioner was, therefore, deprived of his rights to due process under the Fourteenth Amendment on three separate grounds.

The Supreme Court of Illinois denied the Petition for Leave to Appeal on October 6, 2004.

ARGUMENT I

I. The Petitioner Has Alleged That It *"Fully Performed"* Its Obligations Under The Agreement Set Forth In The Second Amended Complaint. In Illinois, Motions To Dismiss Are Like Demurrers In California—The Allegation Is Deemed Admitted. Illinois Has Deprived Petitioner Of Procedural And Substantive Due Process Of Law By Dismissing The Second Amended Complaint As Being Unenforceable Under The Statute Of Frauds And For Failure To State A Claim

In paragraph 44 of the Second Amended Complaint, Petitioner alleges:

> "44. BCE *fully* performed under the agreement alleged in paragraphs 7-25 herein except for as may have been excused by the conduct of Brunswick." [1]

In ruling on Motions to Dismiss under Illinois sections 2-619(a)(7) and 2-615, *"the trial court should admit all well-pleaded facts as true."* [2] The above allegations as to *"full performance"* are, therefore, deemed *"admitted."*

As Brunswick's Brief on Appeal aptly states:

> *"Brunswick does not dispute that, in a proper case, full performance of an oral contract may justify the enforcement of an agreement that would otherwise be invalid under the statute of frauds. See, e.g., McInerney v Charter Golf, Inc., 176 Ill.2d 482, 491, 680 NE.2d 1347, 1352 (1997). "[A] party who has fully performed an oral contract within the one-year provision may nonetheless have the contract enforced." However, BCE has failed to allege full performance of its obligations under the agreement in the manner necessary to avail itself of*

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[1] Second Amended Complaint, p. 19.

[2] Brief on Appeal of Defendant/Appellee Brunswick Corporation, Standard of Review, p. 13.

this exception to the Statute of Frauds. The Trial Court agreed: "[T]he question is, is this full performance, and I have some real reservations saying that it is, because as I reviewed that, it was a long-term relationship, if you want to call it that, and it included building parts." [3] *(R.Tr. 25-26.)*

The allegation that Petitioner has *fully performed* its obligations pursuant to the Oral Agreement is deemed admitted. Despite the fact that these were Motions to Dismiss the Second Amended Complaint, the trial court made its own Finding of Fact that *"this was not 'full performance.'"* By affirming the Trial Court's holding, the Supreme Court and the Illinois Court of Appeal were denying Petitioner a hearing on that Question of Fact. That is a denial of procedural due process under the Fourteenth Amendment. It is also denial of substantive due process rights as to Petitioner's property rights, since the total property loss to Petitioner, as alleged in the Second Amended Complaint, was the sum of $7,643,323.00. [4]

ARGUMENT II

II. "The Prevailing Feeling Both In The Legal And Commercial World Is . . . That" The Statute Of Frauds Has "Outlived" [Its] "Usefulness, And" [Is] "Quite Out Of Place Amid The Changed Legal And Commercial Conditions Of Today." [5]

In footnote 3 of the *Sunset-Sternau* case, Justice Tobriner quotes Holdsworth as follows:

". . . The writer's study of the cases, above referred to, has fully convinced him as follows: 1. that belief in the

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[3] Brunswick Corporation's Brief on Appeal, p. 25-26.

[4] Petitioner's Second Amended Complaint, p. 12

[5] *Sunset-Sternav Food C. v Bonzi* (1964) 60 C.2d 834, 838, fn. 3, 36 Cal.Rptr. 741, Justice Tobriner wrote the majority opinion (6-1) and quotes Holdsworth; 6 Holdsworth, *History of English* Law (1924) 396.

> *certainty* and *uniformity* in the application of any presently existing statute of frauds is a *magnificent illusion*; 2. that fraudulent and perjured assertions of a contract are far less likely to be successful; 3. that from the very first, the requirement of a signed writing has been at odds with the established habits of men, a habit of *reliance* upon the spoken word in increasing millions of cases; 4. that when the courts enforce detailed formal requirements, they foster dishonest repudiation without preventing fraud; 5. that in innumerable cases the courts have *invented devices* by which to 'take the case out of the statute'; 6. that the decisions do not justify some of the rules laid down in the Restatement of Contracts to which the present writer assented some 20 years ago."

The correct date for the enactment of the Statute of Frauds is April 16, 1677. It comes to us from Great Britain and has been reenacted or adopted as a part of the common law by every state in the Union. [6]

"The original purpose for the enactment of the Statute of Frauds *was to prevent fraud caused by perjury*; . . ." [7] the original reasons for the enactment of the Statute of Frauds *"no longer exist because of the competency of parties to testify, the control exercised by the courts over the jury and changes . . . in the law of contracts . . .".* [8]

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[6] "The Statute of Frauds—A Legal Anachronism," Hugh Evander Willis, 3 *Indiana Law Journal* 427 (1928)

[7] *Ibid.*, p. 427.

[8] *Ibid.*, p. 540.

ARGUMENT III

III. Although The Statute Of Frauds Is Still Alive In Most Jurisdictions Of The United States, It Is Not *"Settled"* Law And Requires The Intervention Of This Court To Explain The Ambiguities, Resolve The Differences And To Protect The Plaintiff From The Denial Of Property Rights And The Denial Of Substantive Due Process Rights Under The Constitution

Respondent's Brief to the Illinois Supreme Court says the following:

> "Instead, this case involves straightforward application of *settled* law to these particular litigants . . ." [9]

The law is not *settled* in most jurisdictions, which conflict with other jurisdictions.

The question becomes: *Which law do we use?* Brunswick is a *Delaware* corporation headquartered in Lake Forest, *Illinois*. (Defendant-Appellee's Brief on Appeal, p. 4.) The plaintiff BCE is a *California* corporation.

The parties "engaged in a series of meetings in a variety of locales, including *Illinois*, *Taiwan, Nevada, Pennsylvania*, and *Mexico*." [10] The bicycle parts plant was built in Saltillo, México. [11] I don't believe that Taiwan or Mexico have ever even heard of the "Statute of Frauds."

But let's take *California* law versus *Illinois* law. Plaintiff could easily take the position that California law should be

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[9] Respondent's Brief to the Supreme Court, p. 16; the law on the statutes of frauds is hardly *"settled."* Not only has it been virtually repealed in Great Britain, but the *certainty* and the *uniformity* of its application in the United States is a *magnificent illusion*. *Sunset-Sternau Food Co. v Bonzi* (1964) 60 Cal.2d 834, fn 3, 36 CR 741.

[10] Defendant-Appellee's Brief on Appeal, p. 4.

[11] Ibid., p. 4.

applied since the plaintiff is a California corporation and since the Second Amended Complaint alleges that *"BCE did in fact invest in a manufacturing plant in Saltillo, Mexico, and built a new factory in Romos Arizoe, Mexico."* [12] Any written check paid toward that partial performance under the contract and any checks received by BCE toward the "vendor-partnership" would have been paid and cashed through plaintiff's main offices in California.

California law on the Statute of Frauds is set forth in *Sunset-Sternau Food Co. v. Bonzi.* [13] With an opinion by Justice Tobriner in a 6-1 decision by the California Supreme Court, *Sunset-Sternau* states:

> "We must, of course, apply the California statute of frauds to a situation which is previously covered by the language of the statute. If the extent of coverage is unclear, however, *we know of no policy reasons which compel a resolution of the ambiguity in favor of its wide application.*[3]" [14]

Illinois, on the other hand, adopts a *conflicting* position with California. In the same year that the *Sunset-Sternau* case was decided, 1964, the Illinois Appellate Court in *Sinclair v Sullivan* (1964) followed the Illinois Supreme Court in *Ozier et al. v. Haines,* [15] which said:

> ". . . the *moral wrong* of refusing to be bound by an agree-ment because it does not comply with the Statute of Frauds does not of itself authorize the application of

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[12] Second Amended Civil Complaint, paragraph 20, p. 10.

[13] *Sunset-Sternau Food Co. v. Bonzi* (1964) 60 Cal.2d 834, 36 C.R. 741.

[14] Ibid., p. 838. Footnote 3 begins: *"The commentators almost unanimously urge that considerations of policy indicate a restricted application of the statute of frauds, if not its total abolition."*

[15] *Sinclair v Sullivan Chevrolet Co.* (1964) 45 Ill.App.2d 10, 195 N.E.2d 250.

> the doctrine of estoppel, *for the breach of a promise which the law does not regard as binding is not a fraud.* . . . To hold otherwise would be to render the statute *entirely nugatory.*" [16]

The Illinois Court, in *Ozier*, also said:

> "To adopt such a view would render the Statute of Frauds useless and unmeaning. It is true that *harsh results* . . . may occur when one has *changed his position* in reliance on the oral promise of another, but it is a result which is *invited* and *risked* when the agreement is not reduced to writing in the manner prescribed by law . . . " [17]

ARGUMENT IV

IV. In An *American Law Review* Article Written In 1974, The Author Lists The Conflict Existing Among The Various States, I.E., That The Doctrine Of Promissory Estoppel May Be Used So That An Oral Agreement Becomes Enforceable Versus The Position That Promissory Estoppel May Not Be Used To Frustrate The Basic Policy Of The Statute Of Frauds

In footnote 59 of the *American Law Review* article on Promissory Estoppel, [18] the note says:

> ". . . it is apparent that whether or not promissory estoppel may defeat the statute of frauds, and if so, under what conditions it will do so, depends at least to some extent upon the *attitude of the various courts toward the statute of frauds as expressing a public policy.* There is an increasing tendency for some scholars and courts to

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[16] *Ozier v Haines*, 411 Ill. 160, 103 N.E.2d 485.

[17] *Ibid.*, 103 N.E.2d 488.

[18] "Promissory Estoppel as Basis For Avoidance of Statute of Frauds," Robert A. Brazener, 56 ALR3d 1037, 1052 (1974).

view the statute of frauds as an anachronism and no longer suitable . . . as a general rule of contracts." [19]

The article lists a number of cases as being in favor of the doctrine of promissory estoppel rendering the oral contract enforceable. [20] It also lists numerous cases where the general position is that promissory estoppel may not be used to frustrate the Statute of Frauds. [21] Note that some states have

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[19] *Ibid.*, p. 1052, fn. 59.

[20] **Alaska**—*Alaska Airlines, Inc. v. Stephenson* (1954, CA9 Alaska) 217 F2d 295 (applying Alaska territorial law). **Ariz**—*Tiffany, Inc., v W.M.K. Transit Mix, Inc.* (1972) 16 Ariz App 415, 493 P2d 1220, 56 ALR3d 1028. **Cal**—*Seymour v Oelrichs* (1909) 156 Cal 782, 106 P 88; *Sunset-Sternau Food Co v Bonzi* (1964) 60 Cal.2d 834, 36 C.R. 741. Although the American Law Review citation is dated in 1974, the *Sunset-Sternau* case was not included. **Nev**—*Harmon v Tanner Motor Tours, Ltd.* (1963) 79 Nev 4, 377 P2d 622. **Okla**—*Lacy v Wozencraft* (1940) 188 Okla 19, 105 P2d 781. **Tex**—*Cooper Petroleum Co. v La Gloria Oil & Gas Co.* (1969, Tex) 436 SW2d 889; *"Moore" Burger, Inc. v Phillips Petroleum Co.* (1972, Tex) 492 SW2d 934; *Aubrey v Workan* (1964, Tex Civ App) 384 SW2d 389, error ref n re; *21 Turtle Creek Square, Ltd. V. New York State Teachers' Retirement System* (1970, CA5 Tex) 432 F2d 64 (applying Texas law), cert den 401 US 955, 28 L.Ed.2d 239, 91 S.Ct. 975. **Utah**—*Easton v Wycoff* (1956) 4 Utah 2d 386, 295 P2d 332.

[21] **Alaska**—*Alaska Airlines, Inc. v Stephenson* (1954, CA9 Alaska) 217 F2d 295 (applying Alaska law). **Ariz**—*Trollope v Koerner* (1970) 106 Ariz 10, 470 P2d 91; *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.* (1972) 16 Ariz App 415, 493 P2d 1220, 56 ALR3d 1028. **Fla**—*Tanenbaum v Biscayne Osteopathic Hospital, Inc.* (1965, Fla App) 173 So 2d 492, ctfd ques ans (Fla) 190 So 2d 777; *Keller v Penovich* (1972, Fla App) 262 So 2d 243. **Ill**—*Sinclair v Sullivan Chevrolet Co.* (1964) 45 Ill App 2d 10, 195, NE2d 250, affd 31 Ill 2d 507, 202 NE2d 516. **NY**—*Kahn v Cecelia Co.* (1941, DC NY) 40 F Supp 878 (applying New York law). **RI**—*Heyman v Adeack Realty Co.* (1967) 102 RI 105, 228 A2d 578. **Tex**—*Cooper Petroleum Co. v La Gloria Oil & Gas Co.* (1969, Tex) 436 SW2d 889; *"Moore" Burger, Inc. v Phillips Petroleum Co.* (1972, Tex) 492 SW2d 934 (by implication); *Texarkana Constr. Co. v Alpine Constr. Specialties, Inc.* (1972, Tex Civ App) 489 SW2d 941, error ref n re; *21 Turtle Creek Square, Ltd. V. New York State Teachers' Retirement System* (1970, CA5 Tex) 432 F2d 64 (applying Texas law), cert den 401 US 955,

both viewpoints and that some cases are listed in *both categories*.

V. The Allegations Of The Second Amended Complaint Are Sufficient To Show That Defendants Had A Fiduciary Relationship With The Plaintiff And A Duty To Disclose Its Business Plans To The Plaintiff

Paragraph 14 of the Second Amended Complaint alleges as follows:

> "14. Because Brunswick had a substantial long-term commitment to Wal-mart [sic], Inc. to supply approximately two million bikes per year the exact specifications for the agreed period of production was typically not known in advance, and because the exact specifications were determined on short lead times, the price was not known in advance. The relationship, the trust and the specifications and requirements for the building of the Mexican operation to supply parts to be needed by Brunswick on short lead times was worked out in the multiple meetings between BCE and Brunswick. *In that the commitment was substantial by BCE to meet the needs of Brunswick and BCE had to perform first, by expending considerable sums to build the operation,* ***Brunswick promised the 'vender-partnership' [sic] to reflect that it was more than just a supplier relationship and that BCE could expect a special relationship of trust*** *and that the undertaking by BCE would be compensated for by Brunswick agreeing to purchase from BCE the parts needed for the production demands of 1999 (1.2 million bikes), 2000 (1.5 million bikes), and 2001 (1.8 million bikes) at a price that was agreed to be set at a higher amount than competitive with China in order to compensate for start up costs, return to capital*

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28 L.Ed.2d 239, 91 S.Ct. 975. **Utah**—*Easton v Wycoff* (1956) 4 Utah 2d 386, 295 P2d 332.

> *and profit for the first three years.* It was agreed that the price would decline for each of the three years as initial costs were recovered. After the first three years, it was agreed that BCE would still have the "vendor-partner" relationship with preference on purchasing, if the product supplied by BCE was competitive as to price and quality. It was agreed that like any partnership not every detail could be worked out in advance, so it was promised by Brunswick *that BCE could rely upon and trust Brunswick, and that after BCE built the operation and BCE could supply the parts on the short lead times, any further details could be worked out by the 'vendor-partners'.* It was agreed that Brunswick would purchase sufficient parts at a price from BCE such as to justify the investment of time, energy and capital to build the Mexican operation to meet the specific needs of Brunswick *and that at a minimum the amount purchased would be that needed to supply 1.2 million bikes in 1999, 1.5 million bikes in 2000 and 1.8 million bikes in 2001.*

Said Second Amended Complaint alleges and refers to the terms "vendor-partner," "vendor partnership," "partner," or "partnership" no less than *fourteen times*. One of the issues presented on Appeal by the Respondent was Issue No 5, which stated:

> "5. Whether Plaintiff alleged facts sufficient to find a fiduciary or confidential relationship to exist between Plaintiff and Defendant, such that Defendant had a duty to disclose its business plans to Plaintiff." [22]

Under the law of every state in the United States, a *partnership* between the opposing parties causes a fiduciary relationship to exist between the partners. *Each partner is bound to act in the utmost good faith and honesty in all deal-*

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[22] Brief on Appeal of Defendant/Appellee Brunswick Corporation, p. 2.

ings and transactions that relate to the business of the partnership. [23]

In a fiduciary relationship, a partner's *"silence alone may constitute fraudulent concealment"* [24] *of material facts.* Although the Illinois Appellate Court ruled against the Appellant on Statute of Limitations' grounds, the Illinois court indicated that plaintiff's allegations did "raise a factual issue as to whether defendant was her fiduciary in *Melko v Dionisio.* [25] This was a case where no partnership was even alleged. In a Section 2-615 motion to dismiss under Illinois law, the allegations of the Complaint are *"viewed in the light most favorable to plaintiff"* and when ruling on a section 2.615 motion to dismiss, *"the trial court should admit all well-pleaded facts as true . . ."* [26]

Having alleged that a Partnership existed between the plaintiff and defendant 14 times in the Second Amended Complaint, with proper allegations of fact, *the trial court must admit those allegations as true.* Once admitted, then the fiduciary relationship exists *as a matter of law.* Or, if it becomes a *question of fact*, then plaintiff is entitled to a jury trial as a matter of *procedural due process* on that issue.

> "The standard of review on a section 2-615 dismissal is *de novo.*" [27] . . . "The same standard of review applies to an order granting a motion to dismiss pursuant to Section 2-619(a)(7) on the basis of the statute of frauds." [28]

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[23] *Cronin v McCarthy*, 264 Ill.App.3d 514, 637 N.E.2d 668 (1994).

[24] *Chicago Park District v Kenroy, Inc.* (1980) 78 Ill.2d 555, 562-563, 37 Ill.Dec. 291, 402 N.E.2d 181.

[25] *Melko v Dionisio*, 580 N.E.2d 586, 593, 219 Ill.App.3d 1048 (1991).

[26] Brief on Appeal of Defendant/Appellee Brunswick Corporation, Standard of Review, p. 13.

[27] *Ibid.*, p. 13; See *Raintree Homes, Inc. v Village of Long Grove*, 335 Ill.App.3d 317, 319, 780 N.E.2d 773, 775 (2d Dist. 2002).

[28] *Ibid.*, p. 14; See *Prodromos v Howard Savings Bank*, 295 Ill.App.3d 470, 474, 692 N.E.2d 707, 710 (1st Dist. 1988).

Paragraph 57 of the Second Amended Complaint and portions of Paragraph 58 of said Complaint allege as follows:

> "57. BCE alleges that there was *a special relationship of trust* between BCE and Brunswick *created out of the 'vendor/partnership agreement.* Furthermore, *Brunswick had a duty to not conceal material and relevant information* as identified herein because of the partnership agreement.
>
> 58. It is alleged that [Brunswick] did knowingly *conceal* from and/or withhold from the plaintiff the facts generally stated regarding the defendant Brunswick's true level of commitment to the Mexican project which was substantially different than that communicated to plaintiff and others to get *inducement* and *reliance* on the project and to invest time, energy and money as plaintiff did *resulting in millions of dollars of losses when Brunswick exited the manufacture of bicycles . . .*"[29]

As the Illinois Supreme Court indicated in the *Chicago Park District* case,[30] *"silence alone may constitute fraudulent concealment"* of material facts as between partners and fiduciaries.

Therefore, the allegations of Paragraphs 14, 57 and 58 of the Second Amended Complaint set forth sufficient facts of a partnership, sufficient facts of a fiduciary relationship, and sufficient facts to show that defendant Brunswick Corporation "had a duty to disclose its business plans to the Plaintiff before Plaintiff had expended several million dollars on a manufacturing plant in Saltillo, Mexico, and built a new factory in Arizor, Mexico." Brunswick's Issues on Appeal, No. 5 and No. 6, must be resolved in favor of the Petitioner.

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[29] Second Amended Compalint, p. 25.

[30] *Chicago Park District v Kenroy, Inc.* (1980) 78 Ill.2d 555, 562, 563, 37 Ill.Dec. 291, 402 N.E.2d 181.

VI. *Perry v Sinderman* [31] Holds That A Constitutionally Protected Property Interest Is Clearly Established And The Due Process Rights Of The Plaintiff Are Involved As A Matter Of *"Fundamental Fairness"* Whether It Be Created Through A Statutory Entitlement, The Operation Of Institutional Common Law Or *Through Principles Of Contract Law*

> ". . . 'Property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' . . . *A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."* [32]

A. In Illinois the Statute of Frauds Does Not Bar Enforcement of an Oral Contract Where There Has Been Full or Sufficient Performance by the Parties

In *Yorkville National Bank v Schaefer*, [33] the Illinois Appellate Court said:

> "Moreover, even if, *arguendo*, the requirements of the statute were not formally met, the courts of Illinois recognize that the statute [of frauds] is not available as a defense when there is *sufficient* performance by one party in reliance upon the agreement.' (*Anastaplo v Radford* [1958], 14 Ill.2d 526, 537-8, 153 N.E.2d 37, 43.) While this performance doctrine was first developed in the context of land sales contracts, it has also been

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[31] *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[32] *Ibid.*, 33 L.Ed.2d 5.

[33] *Yorkville National Bank v Schaefer* (1979) 71 Ill.App.3d 137, 388 N.E.2d 1312.

applied in cases where an advancement of funds has been made in reliance upon a suretyship promise." [34]

In *Grundy County National Bank v Westfall*,[35] the Illinois Appellate Court said the following:

> [3-5]"The defendant strongly stresses that the case before us is one which falls within the purview of the Statute of Frauds and consequently the trial court erred in denying her motion for summary judgment. In our opinion there exists a serious question as to whether the defendant's interpretation of the Statute of Frauds is a meritorious defense since the statute has no application where there has been substantial performance on the part of one party in reliance on an agreement. See Anastaplo v Radford, 14 Ill.2d 526, 153 N.E.2d 37. The defendant cannot and does not deny that *substantial performance* in the advancement of funds to her husband was made by the plaintiff. However, for purposes of arguendo only we will assume that the loan guaranty agreement is of the genus that normally would be required to meet the requirement of the Statute of Frauds. Accepting this assumption we nevertheless do not agree that the statute constitutes a defense to the action of the plaintiff. *It is well established in our state that the courts will not permit the Statute of Frauds, the only purpose of which is to prevent fraud, to be used where the effect will be to accomplish a fraud and if the facts are such that it would be a virtual fraud to permit the defendant to interpose the statute, a court will not listen to that defense.* Wessel v Eilenberger, 2 Ill.2d 522, 119 N.E.2d 207. The trial court in the instant case in its written opinion made the observation that to permit the defendant to now rely upon the Statute of Frauds would have the effect of per-

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[34] *Ibid.*, 388 N.E.2d 1312, 1315.

[35] *Grundy County National Bank v Westfall* (1973) 13 Ill.App.3d 839, 301 N.E.2d 28.

petrating a fraud, not preventing one. With this observation we agree." [36]

B. The *Certainty* and *Uniformity* in the Application of Any Presently Existing Statute of Frauds is a *Magnificent Illusion.*[37] Whether Promissory Estoppel May Defeat the Statute of Frauds Depends . . . *Upon the Attitude of the Various Courts Toward the Statute of Frauds as Expressing a Public Policy.*[38] That lack of *Uniformity*, Among the States, Deprives the Plaintiff of Substantive Due Process in the Form of *"Liberty of Contract"*

The Fourteenth Amendment forbids any state of depriving any person of *life, liberty, or property* without due process of law.

> "For all its consequence, *due process* has never been, and perhaps never can be, precisely defined." Unlike some legal rules, this Court has said, "due process is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Cafeteria Workers v McElroy*, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 81 S.Ct. 1743. "Rather, the phrase expresses the requirement of *fundamental fairness*, a requirement whose meaning can be as opaque as its importance is lofty." [39]

In *Allgeyer v Louisiana*,[40] the legislature of Louisiana passed an act in 1894 that prohibited any person, firm or cor-

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[36] *Ibid.*, 301 N.E.2d 32.

[37] *Sunset-Sternau Food Co. v Bonzi* (1964) 60 C.2d 834, 838, fn. 3, 36 Cal.Rptr. 741, Opinion by Justice Tobriner.

[38] 56 A.L.R.3d 1037, 1052, fn. 59.

[39] *Lassiter v Dept. of Social Services of Durham County, North Carolina* (1981) 462 U.S. 18, 68 L.Ed.2d 640, 648, 101 S.Ct. 2153.

[40] *Allgeyer v Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897).

poration from issuing or procuring an insurance policy on goods located within the State of Louisiana unless the insurance company had its own agent in the state and was otherwise complying with Louisiana law. The contract of insurance was entered into in New York City.

The Supreme Court of the United States said:

> "We are not dealing with the contract. If it be legal in New York, it is valid elsewhere."
>
> * * * *
>
> "When we speak of the *liberty of contract* for insurance . . . we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract."
>
> * * * *
>
> "To deprive [a person] of such a right as herein described without due process of law is illegal." . . . *"[It] is not due process of law."* [41]

Although the Illinois courts do have cases that allow the plaintiff to ignore the Statute of Frauds when there has been *substantial performance* or where there was *substantial fraud* such as the *Yorkville National Bank* case or the *Grundy County National Bank* case, [42] for the most part, Illinois is about *seventy-five years behind the times.* [43] In *Ozier v Haines*, the Supreme Court said:

> "To adopt such a view would render the Statute of Frauds useless and unmeaning. It is true that *harsh results* . . . may occur when one has *changed his position* in reliance on the oral promise of another, but it is a result which is *invited* and *risked* when the agreement is

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[41] *Ibid.*, 17 Supreme Court Reporter 427, 429, 432.

[42] See footnotes 33 and 35.

[43] "The Statute of Frauds—A Legal Anachronism,: *3 Indiana Law Journal* 437 (1928).

not reduced to writing in the manner prescribed by law . . . "[44]

England has largely repealed the Statute of Frauds.[45] The lack of uniformity in the cases within the United States has caused a serious problem. The manner in which the Illinois courts dismissed this case on the pleadings is a disgrace. The Petitioner alleged *"full performance"* and the loss of several millions of dollars. The Petitioner also alleged a Partnership and a fiduciary responsibility. Even in Illinois, a partner's *"silence alone may constitute a fraudulent concealment"*[46] of material facts. The Illinois courts did not touch this issue.

CONCLUSION

The Statute of Frauds was enacted on April 16, 1677, in Great Britain. It has been almost completely repealed in England. Yet in this country, and especially in the State of Illinois, the doctrine still remains. In every other possible jurisdiction that this lawsuit could have been filed, the Petitioner would have been successful. Here, we have a Dismissal on the pleadings when justice and equity cry out for something that would be "fundamentally fair." That is what "due process" is all about.

The Second Amended Complaint alleges that there was a "full performance," sufficient to take it out of the Statute of Frauds, even under Illinois law. In addition, the Second Amended Complaint alleges that a Partnership existed between Brunswick and the Petitioner. In every state of the Union, that means that there is a fiduciary relationship between the parties. From the pleadings, then, Brunswick had a duty to disclose its business plans to the Petitioner.

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[44] *Ozier v Haines* (1952) 411 Ill. 160, 103 N.E.2d 485, 488.

[45] See Witkin's *Summary of California Law*, Vol. I, 261; Rest.2d Contracts, Vol. 1, p. 281.

[46] *Chicago Park District v Kenroy, Inc.* (1980) 78 Ill.2d 555, 562, 563, 402 N.E.2d 181.

Finally, although the argument is not used as often as it should be, Petitioner had a "liberty of contract" under the 14th Amendment. The lack of *uniformity* among the states, and the attitude of the various courts toward the Statue of Frauds as *expressing a public policy* make it important for this Court to consider granting Petitioner a hearing for the purpose of examining the conflicting doctrines and attempting to make some sense out of the issues.

Petitioner has been deprived of procedural and substantive due process on each of the above three grounds.

Respectfully submitted,

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January 4, 2005

APPENDIX A

SUPREME COURT OF ILLINOIS
Clerk of the Court
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

October 6, 2004

Mr. J. Grant Kennedy
Law offices of J. Grant Kennedy
141 Duesenberg Drive, Suite 4
Westlake Village, CA 91362-3489

No. 98803—Bicycle Components Express, Inc., etc., petitioner, v. Brunswick Corporation et al., respondents. Leave to appeal, Appellant Court, Second District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 2004.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

[Filed April 26, 2004]

No. 01-L-1057

BICYCLE COMPONENTS EXPRESS, INC., d/b/a SOLEUS,
Plaintiff-Appellant,

v.

BRUNSWICK CORPORATION, BRUNSWICK BICYCLE,
and DOES 1-50.
Defendants-Appellees.

Appeal from the Circuit Court of Lake County

RULE 23 ORDER

Honorable JOHN R. GOSHGARIAN, *Judge*, Presiding

Plaintiff, Bicycle Components Express, Inc., d/b/a Soeus (BCE), appeals the dismissal of its complaint against defendant, Brunswick Corporation, Brunswick Bicycle, and Does 1-50 (Brunswick), seeking damages after Brunswick stopped manufacturing bicycles and stopped ordering parts from BCE. We affirm.

The following facts are taken from the pleadings and attached documents. On October 10, 2002, BCE filed its second amended complaint (complaint) against Brunswick asserting causes of action for breach of contract, equitable estoppel, "quantum meruit and/or substantial performance," and "fraud

and deceit." The complaint alleged that Brunswick promised to purchase bicycle parts from BCE if BCE would build a factory in Mexico. BCE also alleged that Brunswick made oral representations to the same effect and that BCE reasonably relied on the representations.

BCE's complaint alleged that sometime in the mid 1990s, Brunswick, headquartered in Lake Forest, Illinois, bought Roadmaster Bicycle and formed a bicycle division. Brunswick operated bicycle manufacturing facilities in Illinois and Mexico. In 1998 and 1999, representatives from BCE and Brunswick met and discussed BCE producing bicycle parts for Brunswick's Mexican facility. As a result of these discussions, the parties entered into an oral agreement on or about January 20, 1999.

According to BCE the parties agreed:

> "BCE would immediately build an operation in Mexico that would have the capacity and ability to supply bicycle parts to Brunswick in amount, quality, and per the specifications and scheduling needs of Brunswick bicycle production forecasted production levels over the next three years. As part of the agreement, Brunswick promised to be a "vendor-partner" with BCE and to buy parts from BCE for bicycle production schedules for 1999 in the amount of 1.2 million, for 2000, 1.5 million and for 2001 parts for 1.8 million bikes to be produced. The price paid would be established so as to justify the start up costs, return to capital and a reasonable profit for the investment required to build the Mexican production operation."

BCE also alleged that the parties "agreed that the duration of the agreement was that BCE would be a 'vendor-partner' for a minimum of three years and there after as long as price and quality of BCE were competitive." Because the bicycle parts could have been produced cheaper in BCE's Asia facility, BCE "required assurances from Brunswick" before

starting production in Mexico. BCE alleged that Brunswick orally represented to BCE that, if BCE built a manufacturing facility in Mexico, "Brunswick promised to be manufacturing in Mexico for at least the next three years" and "promised to buy the level parts for 1999, 2000 and 2001."

According to BCE's complaint in February or March 1999, it hired and trained a manager to work at a new factory in Mexico and built manufacturing facilities in Saltillo and Ramos Arizpe, Mexico to meet Brunswick's needs. In May and July 1999, a Brunswick representative viewed the proposed BCE factory in Mexico. On August 3, 1999, a Brunswick employee, Kevin Kabbes, "was representing to BCE and others that Brunswick had a 15 million dollar fund to help vendors (Asian) to set up in Mexico over the next three years." By September 1999, BCE's Mexican facilities were producing parts for Brunswick, and Brunswick made payments to BCE for parts it had ordered.

In addition, BCE alleged that at various times Brunswick management (its chief executive officer, president, chief financial officer, finance committee, and board of directors) considered whether Brunswick should stop manufacturing bicycles. As early as June 1998, Brunswick was "evaluating" "contingency plans" in case income was not as expected. This contingency plan included closing its bicycle division.

On January 13, 2000, Brunswick announced that it would cease its production of bicycles in North America, and it stopped its production bicycles on June 27, 2000, exiting the bicycle business. Nevertheless, through January 12, 2000, Brunswick representatives were "still attempting to recruit suppliers to come to Mexico" and promising a long-term commitment.

BCE alleged that Brunswick's upper management allowed its representatives to "disseminate false representations" regarding its intentions in Mexico. BCE's Mexican factory had

no other purpose but to meet Brunswick's needs and, as a result of Brunswick's unexpected halt of bicycle production, BCE suffered losses as follows: $270,000 net loss in the value of its Mexican properties; $835,000 net loss in the value of its machinery and equipment; approximately $3.199 million operating losses from September 1999 to June 2000; and $3.321 million in lost anticipated profits for three-years.

On January 14, 2003, the trial court granted Brunswick's motion to dismiss all counts of BCE's complaint. The court based its 2—619(a)(7) dismissal of the breach of contract claim on the statute of frauds. 735 ILCS 55/2–619(a)(7) (West 2000). The remaining claims were dismissed based on section 2—615 for failure to state a cause of action, 735 ILCS 5/2–615 (West 2000). In dismissing the case, the trial court stated:

> "I think [BCE] pled himself right into the Statute of Frauds. That's the problem that I have with it. And the question is[,] is this full performance, and I have some real reservations about saying that it is, because as I reviewed that, it was a long-term relationship, if you want to call it that, and it including building parts.
>
> So, I'll grant the motion as to the fraud and the equitable estoppel. I think there is not enough specific facts to support fraud. And future conduct is not sufficient to show any misrepresentation. You can't justifiably rely on such future representations in Illinois. So I'll grant the motions."

This appeal followed.

On appeal, BCE argues that the trial court erred by dismissing its breach of oral contract claim. BCE contends that the statute of frauds does not bar enforcement of the alleged contract because it was reasonably capable of being performed within three years and BCE fully performed its obligation under the contract.

A trial court must grant a section 2—619(a)(7) motion to dismiss based upon the Statute of Frauds or "other affirmative matter" defeating the claim, if, after reviewing all the pleadings and supporting documents in the light most favorable to the plaintiff, the plaintiff can prove no set of facts to support a cause of action. *In re Chicago Flood Litigation*, 176 Ill.2d 179, 189 (1997). The trial court must take all well-pleaded facts in the complaint and attached exhibits as true and construe from them all reasonable inferences in the plaintiffs favor. *Prodromos v. Howard Savings Bank*, 295 Ill. App. 3d 470, 474 (1998). The trial court must also consider whether the defendant presented facts constituting an affirmative defense which could defeat the plaintiffs cause of action. *Prodromos*, 295 Ill. App. 3d at 474. We review a section 2—619(a)(7) motion to dismiss de novo. *Prodromos*, 295 Ill. App. 3d at 474.

The Statute of Frauds states that:

> "No action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." 740 ILCS 80/1 (West 2000).

In other words, an oral agreement is barred from enforcement by the statute of frauds if "it anticipates a relationship of long duration—certainly longer than one year." *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 490 (1997).

BCE argues that, pursuant to the alleged oral agreement, made on or about January 20, 1999, Brunswick promised to offer to buy bicycle parts from BCE's Mexico factory, for 4.5 million bicycles Brunswick planned to make from 1999 to 2001. BCE argues that the agreement was capable of perfor-

mance within one year because BCE built the factory within one year and Brunswick could have ordered all the parts it would have needed within one year of the agreement date. However, we fail to understand how placement of an order would constitute complete performance of the agreement. BCE alleged in its second amended complaint that "the duration of the agreement was that BCE would be a 'vendor-partner' for a minimum of three years." In this case, we need not speculate about the likelihood or possibility of Brunswick placing an order within any particular time period because the alleged agreement contained a specific date by which it would be considered fully performed. *See Sherwin v. Ault*, 219 Ill. App. 3d 213, 217 (1991), Thus, the alleged oral agreement falls within the statute of frauds and is unenforceable, and the trial court properly dismissed BCE's claim alleging breach of contract based on section 2—619(a)(7) of the Code of Civil Procedure. 735 ILCS 2—619(a)(7) (West 2002).

BCE also argues that the agreement is outside the statute of frauds because BCE fully performed its obligations under the agreement. BCE contends that by building a factory in Mexico it fully performed its obligation under the agreement. It is well settled that, where one party completely performs a contract, the contract is enforceable and the statute of frauds may not be used as a defense to enforcement. *McInerney*, 176 I11.2d at 492. This narrow exception to the Statute of Frauds exists to prevent a party from avoiding its obligations under a contract when the other party fully performs all his obligations in reasonable reliance on the contract. *Greenberger, Krauss & Tenenbaum, v. Catalfo*, 293 Ill. App.3d 88, 96 (1997).

However, in this case, even after reading the complaint in a light most favorable to BCE, we fail to understand how the building of a factory conferred a benefit to Brunswick. Until BCE manufactured the parts Brunswick needed, the factory in

Mexico conferred no benefit on Brunswick. Any alleged contract must have obligated BCE to do more than build a factory in Mexico. Accordingly, BCE's complaint does not sufficiently establish full performance.

BCE argues, for the first time on appeal, that the alleged oral agreement was an option contract. BCE contends that, in exchange for building its factory in Mexico, BCE obtained an option to sell parts to Brunswick. Because this theory was not raised in the trial court below and is not contained in the pleadings, it is waived. *See West Suburban Bank v. Attorneys' Title Insurance Fund, Inc.*, 326 Ill. App. 3d 502, 510 (2001). Absent waiver, BCE's argument fails because its complaint failed to allege specific facts to establish the existence of an options contract capable of enforcement.

Next, BCE argues that the trial court erred by dismissing its claim for fraudulent concealment based on section 2—615 of the Code. 735 ILCS 5/2—615 (West 2000). BCE asserts that Brunswick should be estoppel from asserting a defense under the statute of frauds because Brunswick failed to tell BCE that it intended to stop manufacturing bicycles. Brunswick argues that it had no duty to disclose its potential plans.

To establish a claim for fraudulent concealment, a plaintiff must prove that the defendant was under a duty to disclose the fact concealed. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996). A duty to disclose may arise out of a fiduciary or confidential relationship. *Connick*, 174 Ill. 2d at 500. A confidential relationship exists when a defendant is in a position of "influence and superiority" over the plaintiff or is dominant because of superior knowledge of the matter or from a plaintiff's weakness, dependence, or trust in a defendant. *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 657 (2001).

In this case, BCE argues that its relationship with Brunswick entailed such a disparity of control, bargaining position,

influence, and dependency that Brunswick owed a duty to disclose to BCE its intention or deliberation of stopping its manufacture of bicycles. We do not find this argument persuasive. BCE's' complaint contains nothing more than conclusory allegations that it had a fiduciary or confidential relationship with Brunswick. BCE has failed to allege sufficient facts to establish a fiduciary or confidential relationship with Brunswick. BCE and Brunswick are both businesses that allegedly negotiated an agreement wherein BCE agreed to sell Brunswick bicycle parts at competitive prices. Such businesses are presumed to have negotiated their alleged agreement at arms length. *See Midwest Decks, Inc. v. Butler & Baretz Acquisitions, Inc.*, 272 Ill. App. 3d 370, 380-81 (1995). In fact BCE alleged in its second amended complaint that future prices were to be negotiated between the parties. Further, BCE failed to allege that Brunswick agreed to exercise judgment on BCE's behalf or to act as BCE's fiduciary. BCE' second amended complaint alleges no specific facts supporting their assertions of trust, confidence, superior knowledge, influence, or dominance. BCE's conclusory allegations, even when viewed in the light most favorable to BCE, do not give rise to an inference of the significant dominance and superiority which is the touchstone of a fiduciary or confidential relationship. *See Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 22 (1995). Because BCE has not alleged facts that establish that Brunswick owed a duty to disclose its potential plan to stop its manufacture of bicycles, BCE's fraudulent concealment claim was properly dismissed.

BCE also argues that the facts alleged in its second amended complaint support a claim for fraudulent misrepresentation. To state a claim for fraudulent misrepresentation, a plaintiff must allege, *inter alia*, that the defendant made a false statement of material fact knowing or believing that such statement was false. *Connick*, 174 Ill. 2d at 496. A claim of fraud must contain specific allegations of facts from which fraud is necessary or probable inference, including

what misrepresentations were made, when they were made, who made the misrepresentations, and to whom they were made. *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 419-20 (2003). BCE's complaint does not meet this standard. It alleges:

> "That on or about August 3, 1999 Brunswick Kevin Kabbes, was representing to BCE and others that Brunswick had a 15 million dollar fund to help vendors (Asian) to set up in Mexico over the next three years."

However, BCE's complaint does not allege that Kabbes knew or believed the statement was untrue on August 3, 1999, or that BCE relied on this statement. According to BCE's complaint, its Mexican factory was being built in July 1999 and started producing parts in September 1999. Therefore, BCE could not have relied on Kabbes' August 1999 statement, since it had already moved its factory to Mexico at that time. Thus, BCE failed to state a cause of action for fraudulent misrepresentation.

Next, BCE argues that the facts alleged in its second amended complaint support a claim for equitable estoppel. To claim equitable estoppel and avoid the statute of frauds BCE had to allege, in part, that BCE relied upon a misrepresentation or concealment of a material fact made by Brunswick. *See McInerney.*, 176 I11.2d at 492. However, BCE failed to allege with specificity that Brunswick made any false misrepresentation prior to the alleged oral agreement or prior to BCE's decision to move its factory to Mexico. In the absence of such fraud or misrepresentation, BCE must be said to have acted solely upon its own judgment and at its own risk. *See Ozier v. Haines*, 411 Ill, 160, 165 (1952); *McInerney*, 176 Ill.2d at 493. Accordingly, BCE failed to sufficiently allege the facts necessary to equitably estop Brunswick from asserting its statute of frauds defense.

In addition, BCE argues that it stated a claim for promissory estoppel. However, BCE ignores well settled law that

promissory estoppel does not bar application of the statute of frauds in Illinois. *See McInerney*, 176 Ill.2d at 492. Accordingly, the trial court properly dismissed this claim.

The judgment of the circuit court of Lake County is affirmed.

Affirmed.

McLAREN, J., with BYRNE and KAPALA, JJ., concurring.

APPENDIX C

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

[Oct. 10, 2002]

Gen. No. 01 L 1057

BICYCLE COMPONENTS EXPRESS, INC., d/b/a SOLEUS,
Plaintiffs,

v.

BRUNSWICK CORPORATION,
BRUNSWICK BICYCLE, and DOES 1-50,
Defendants.

JURY TRIAL REQUESTED

SECOND AMENDED CIVIL COMPLAINT AT LAW FOR

1. Breach of Contract
2. Equitable Estoppel
3. Quantum Merruit and/or Substantial Performance
4. Fraud and deceit

NOW COMES the Plaintiff Bicycle Components Express, Inc. (Hereafter "BCE") a Corporation duly licensed in the State of California and doing business as SOLEUS, by and through it's attorney, J. Grant Kennedy, who has been granted permission to appear *pro hac vice* in this action and in association Illinois attorney Steven Leahy, and complaining of the

Defendant Brunswick Bicycle Corporation, a Delaware corporation d.b.a. Brunswick Bicycle and Does 1-50 Inclusive, states as follows:

1. Plaintiff BCE is a Corporation duly licensed in the State of California and doing business as SOLEUS.

2. Defendant Brunswick Corporation (Hereafter "Brunswick") is a Delaware corporation headquartered in Lake Forest, Illinois.

3. Defendant Brunswick Bicycle was a division, operation, or other unit of the recreation operations of Brunswick as of, or at about the date Brunswick purchased Roadmaster Bicycle, which occurred in approximately the early to mid 1990's. The exact form, classification and/or type of business entity, if any, of the bicycle operations within Brunswick is unknown.

4. The true names and capacities, whether individual, corporate, associate or otherwise of defendants named herein as DOES 1-50, inclusive, are unknown to plaintiffs who therefore sues said defendants by such fictitious names, and plaintiff will amend this complaint to show their true names and capacities when the same have been ascertained. On information and belief, each DOE defendant is in some manner responsible, liable and obligated to plaintiffs in connection with the occurrences, transactions, and obligations alleged herein.

5. The matter in controversy exceeds the sum of $50,001 such that this action is properly placed before this Court and Illinois Supreme Court Rule 222 is non-applicable.

6. These initial six paragraphs are incorporated by reference into each cause of action in this amended complaint as though set out in full.

Action for Breach of Contract

(As against Brunswick Corporation d.b.a
Brunswick Bicycle and Does 1-50 Inclusive)

7. Brunswick, through it bicycle division and the authorized agent's representatives David Lumley, Monte Sharma, Howard Atkinson entered into an a oral contract with BCE on or about January 20th, 1999 whereby BCE would immediately build an operation in Mexico that would have the capacity and ability to supply bicycle parts to Brunswick in amount, quality, and per the specifications and scheduling needs of Brunswick bicycle production forecasted productions levels over the next three years. As part of the agreement, Brunswick promised to be a "vendor-partner" with BCE and to buy parts from BCE for bicycle production schedules for 1999 in the amount of 1.2 million, for 2000, 1.5 million and for 2001 parts for 1.8 million bikes to be produced. The price paid would be established so as to justify the start up costs, return to capital and a reasonable profit for the investment required to build the Mexican production operation.

8. The universe of bicycle parts to be produced under the agreement involved suspension forks, derailers and saddles.

9. The specifications for the parts that would be needed and how the part specifications for future parts would be determined and put into production in the "vendor-partnership" was agreed to by BCE and Brunswick who had a history of working relationship between BCE and key individuals at Brunswick who had for.rerly been with Roadmaster and whom had worked with BCE in the past.

10. Mr. Chu and Mr. Cunnane for BCE had regular and frequent dealings with Bob Guinn (Brunswick Corp. Director of Materials at Brunswick Corporation bicycle division, his duties included responsibility for developing business relationships with entities such as BCE that could source com-

ponent parts to the Brunswick Mexican bicycle operation and he was responsible for purchasing, inbound freight and warehousing of component bicycle parts and finished goods for all Brunswick bicycle plants, including ones in Olney, Illinois and Mexico and he was also the boss of Kevin Kabbes); Kevin Kabbes (purchasing manager, responsible for purchasing bicycle components parts for Brunswick North American plants including the one in Olney, Illinois and the Mexican facility); and, Howard Atkenson who was the plant of manager of the Roadmaster operations. Roadmaster had been purchased by Brunswick and these individuals remained with Brunswick at the factory located in Olney, Illinois. When Roadmaster was purchased, Howard Atkenson became the General Manager of the Mexican operations of Brunswick, located in Rosentel, Mexico. This was the facility where Brunswick began manufacturing bicycles around February 1997 in Mexico and it was the plant that BCE was to supply.

11. There were approximately 12-15 meetings during 1998 and 1999 wherein issues regarding the agreement were discussed. These involved BCE through Pat Cunnane and/or Simon Chu and for Brunswick, Robert Guinn ; Kevin Kabbes, Jim Coninx, (vice president of finance in the bicycle division of Brunswick Corporation from January 1999 until December 29, 2000); and Howard Atkenson, the General Manager of the Mexican operations of Brunswick located in Rosentel, Mexico. In the December 15 meeting, other participants may have been Steve Reeds, the bicycle division purchasing manager for finished goods, Monty Sharma, then vice president of operations for Brunswick Bicycles, and Ed Miyashita, then its product manager.

12. These executives, employees and agents of Brunswick's bicycle division, met, called, discussed, wrote, and otherwise communicated with Pat Cunnane and Simon Chu to come to an agreement in January, 1999 when it was agreed to be a "vender partnership" agreement because of the nature of

the bicycle industry and Brunswick's needs. As such, the "vender partner" agreement included an agreement to have a working relationship based upon flexibility as to specifics of specifications, price and scheduling so that the needs of Brunswick could be met.

13. Most of those meetings took place at the Brunswick facility in Olney., Illinois, but some of them also took place at Brunswick's offices in Vernon Hills, Illinois, at various bicycle trade shows in Taipei, Taiwan, Las Vegas, Nevada, at Pat Cunnanes' office in Glenside, Pennsylvania and in Mexico. At those meetings, these individuals discussed subjects such as what parts could be produced, the time frame for production, and other usual topics related to the "vendor partnership" agreement.

14. Because Brunswick had a substantial long-term commitment to Wal-mart, Inc. to supply approximately two million bikes per year the exact specifications for the agreed period of production was typically not known in advance, and because the exact specifications were determined on short lead times, the price was not known in advance. The relationship, the trust and the specifications and requirements for the building of the Mexican operation to supply parts to be needed by Brunswick on short lead times was worked out in the multiple meetings between BCE and Brunswick. In that the commitment was substantial by BCE to meet the needs of Brunswick and BCE had to perform first, by expending considerable sums to build the operation, Brunswick promised the "vender-partnership" to reflect that it was more than just a supplier relationship and that BCE could expect a special relationship of trust and that the undertaking by BCE would be compensated for by Brunswick agreeing to purchase from BCE the parts needed for the production demands of 1999 (1.2 million bikes), 2000 (1.5 million bikes), and 2001 (1.8 million bikes) at a price that was agreed to be set at a higher amount than competitive with China in order to compensate

for start up costs, return to capital and profit for the first three years, It was agreed that the price would decline for each of the three years as initial costs were recovered. After the first three years, it was agreed that BCE would still have the "vendor-partner" relationship with preference on purchasing, if the product supplied by BCE was competitive as to price and quality. It was agreed that like any partnership not every detail could be worked out in advance, so it was promised by Brunswick that BCE could rely upon and trust Brunswick, and that after BCE built the operation and BCE could supply the parts on the short lead times, any further details could be worked out by the "vendor-partners". It was agreed that Brunswick would purchase sufficient parts at a price from BCE such as to justify the investment of time, energy and capital to build the Mexican operation to meet the specific needs of Brunswick and that at a minimum the amount purchased would be that needed to supply 1.2 million bikes in 1999, 1.5 million bikes in 2000 and 1.8 million bikes in 2001.

15. The reason specifications and prices could not be set in advance was due to the commitment and relationship to Wal-mart, Inc which was the major asset for Brunswick in the purchase of Roadmaster and in the production in the Mexico operation. The importance of the Wal-mart, Inc connection to Roadmaster/Brunswick and the ability to produce on short lead times is seen in the fact that the formulation of good will was the major asset in the purchase of Roadmaster, Inc. The price paid for Roadmaster, because of the "good will", was over $190,000,000.00 even though Roadmaster, Inc was on the verge of bankruptcy and subsequently filed for bankruptcy. It was the policy of Wal-mart, Inc. that the shortest lead times regarding production had to be utilized by Brunswick so that customer tastes and trends could be maximized for such items such as finishes (black, green, metallic etc), designs (there are many aerodynamic design regarding frames), and materials (Chrome, aluminum, alloy, titanium, etc).

16. Brunswick therefor had a demand for a supplier who could produce to meet the short lead times and changing spec environment dictated by the industry and Wal-mart, Inc. and Brunswick, but production supply also had to come from Mexico so that Brunswick could save millions of dollars under the North American Free Trade Agreement (hereafter "NAFTA") and JIT (Just in Time) production principles could be employed to save substantial amounts interest, warehouse and other carrying costs and to give Brunswick the benefits of more cost-effective production, achieving a more efficient end customer response by facilitating changes to production operating lines and volumes according to customer demand, planning short and long range resources with greater precision, greater efficiency in planning changes in raw material requirements, reduction of work-in-process, ability to expedite special production requirements, avoid processing delays through inventory availability checks on in process parts orders, manage bottlenecks in the manufacturing process by reallocating resources when necessary and increased quality.

17. It was known by both parties to the agreement that the same parts could be produced in Asia and imported cheaper than building a manufacturing facility in Mexico. Both parties were aware of competition pressures from Asia over the several years before the agreement was reached. As a result, BCE required assurances from Brunswick sufficient to warrant the undertaking of several millions of dollars for a production facility in Mexico. In response, Brunswick represented through the above-identified individuals that Brunswick is a bigger, stronger company than Roadmaster used to be and that Brunswick was financially committed to dealing with the economic challenges of a global economy such that Brunswick promised to be manufacturing in Mexico for at least the next three years, that Brunswick had long-term commitment to manufacturing, in Mexico (defined by Brunswick individuals identified above, to mean at least three

years) and that Brunswick promised to buy the level of parts needed for 1999, 2000 and 2001 through purchase orders to be issued by Brunswick to BCE if BCE were to build the Mexican operation. It was agreed that the purchase orders were to be issued for purposes of scheduling and identifying price and specifications but that the "vender-partnership" obligated Brunswick to purchase at the minimum the amount of product needed for 1.2 million bikes in 1999, 1.5 million bikes in 2000 and 1.8 million bikes in 2001 at prices consistent with the return of start up costs, capital, and profit.

18. The first price set under the agreement was for the suspension fork and that was $6.00 for Stage one, $5.85 for stage two; approximate $5.65 for stage three; and $5.50 for stage four. On April 16, 1999 saddles prices were agreed to at a price of $.90 per saddle with production starting at 2,000 units per day and increasing to 5,000 per day.

19. It was agreed by the parties that the duration of the agreement was that BCE would be a "vendor-partner" for a minimum of three years and there after as long as price and quality of BCE were competitive. The time of performance by Brunswick was left open to the dynamics of the short lead times of the market and scheduling needs of Brunswick. Brunswick could have placed a purchase order for the 1.2 million bikes for 1999, the 1.5 million bikes in 2000 and the 1.8 million bikes within the first year of the agreement. It was furthermore agreed between the parties that BCE would limit its sales and marketing efforts to the parts it was to make for Brunswick until the complete requirements of Brunswick were satisfied.

20. BCE did in fact invest in a manufacturing plant in Saltillo, Mexico and built a new factory in Romos Arizpe, Mexico. The plant had adequate manufacturing, warehousing and administrative facilities to meet the production requirement as outlined by Brunswick the series of meetings held between Brunswick and BCE. As agreed to, BCE did use its

expertise and capital to build in Mexico the type of operation for the part production found in Taiwan. The plant capacity and operation was to supply the parts needed to be delivered to Brunswick.

21. The agreement to manufacturer and supply Brunswick was in place and being fulfilled by BCE to Brunswick's satisfaction until January 13, 2000, when Brunswick, without any warning, announced that it was planning to cease manufacturing bicycles in North America. Defendant Brunswick breached the "vendor-partnership" agreement by closing their operations and selling their business instead of fulfilling their duties under the vendor-partnership agreement to purchase products from the plaintiff as described above.

22. On June 27, 2000, it was announced that Brunswick would exit the bicycle business.

23. BCE did everything BCE was to do under the agreement except as may have been excused by the conduct of the Defendant

24. As a result of the breach of the agreement and the reliance on the promises of the Defendant the Plaintiff has suffered damages.

25. BCE has calculated their loss as follows: For the land and building (estimate based on a current sale price of $1,000,000.00—cost of land and improvements $1,240,000.00 and an anticipated sales commission cost of about $30,000 for a total loss on building and land of $270,000.00; the net value of machinery, equipment, tools and die if sold would result in a loss of about $853,000.00; BCE out of pocket operating loss for the period of September 1999 to June 2000. This is not a true cost analysis, rather just a summation of the information—probably on the low side. The cumulative loss of BCE as of June 30, 2000 would be approximately $3,199,323.00. In addition, BCE did not recover the normal profit that should have been earned on the agreement of $1,107,000.00 per year

or $3,321,000.00 had Brunswick placed all of the purchase orders in the first year. That loss would total 3,321,000.00. The total loss to BCE is estimated to be $7,643,323.00.

Second Cause of Action for Equitable Estoppel
(As against Brunswick Corporation and Does 1-50)

26. Paragraphs 1-6 and 7-25 are incorporated hereat as though set out in full, and it is further alleged that in addition to the representations and agreement stated in the first cause of action and incorporated hereat that Brunswick was aware that BCE was relying upon the representations by Brunswick Bicycle Division individuals identified herein. This was known by Brunswick as demonstrated by their knowledge of the acts of BCE in furtherance and in their reliance on the promises of Brunswick, as identified herein, by BCE which included, but is not limited to, Brunswick setting their production needs according to BCE, meaning if BCE did not supply, Brunswick manufacturing would stop. Additionally, they knew that Tom Greb was hired about February or March 1999, to manage the Mexican operation to supply the parts to Brunswick. That Mr. Greb went to a China plant to train and to plan and organize the transition of equipment and materi als to begin assembly in Mexico of the first item for production, the suspension fork. That Brunswick was advised by Pat Cunnane on March 18, 1999, specifically to Bob Guinn and Kevin Kabbes that Mr. Greb was traveling to China for training and to plan the transition of the equipment and materials to begin assembly in Mexico and that production was to reach 5,000 per day with 2 lines working 2 shifts and that there was a four stage plan for assembly and manufactur ing of the suspension. The prices and the time for the parts, production runs and begins were all communicated both orally and in writing on or about the same date of March 18, 1999 to Brunswick representatives, Bob Guinn and Kevin Kabbes.

27. On or about March 22, 1999 Brunswick representatives Kevin Kabbes and Ulysses Serrano visited the Mexican operations of BCE and were shown the detailed plans relating to production capacity and quality assurance capacity regarding the product that was to be provided to Brunswick and they were also shown potential land sites for future factory locations to meet the needs of Brunswick.

28. That on March 25, 1999 Allen Cycle and Keven Kabbes worked on fork specs that would be manufactured and supplied by BCE to Brunswick.

29. That on March 29, 1999 quality systems and an operations plan were established, with Brunswick approving the plan

30. That on April 10, 1999 there was a meeting in Taiwan among Monte Sharma, Kevin Kabbes, Bob Guinn, Richard Whittenburg, Ben Edmonds, Howard Atkinson, Simon Chu, Chang Chung His, Tom Greb and Pat Cunnane. And, there was also a meeting in Simon Chu's room 1261 at 10:00 a.m. with Pat Cunnane, Simon Chu, Monte Sharma, Kevin Kabbes, and Ben Edmunds discussing the agreement such that BCE would be manufacturing for Brunswick in Mexico.

31. That on May 27, 1999 there was a show in Saltillo. Present were Howard Atkinson, Bob Guinn and Kevin Kabbes, Teresa Kamiya, Tom Greb, Pat Cunnane, Simon Chu, Alfredo Gallagos and the site to manufacture for Brunswick was accepted by Brunswick.

32. That on July 12, 1999 Bob Guinn of Brunswick visited the BCE manufacturing plant in Mexico.

33. That on or about August 3, 1999, Brunswick. Kevin Kabbes, was representing to BCE and others that Brunswick had a 15 million dollar fund to help vendors (Asian) to set up in Mexico over the next three years.

34. That on or about September 12, 1999 Brunswick agreed to advance payment to BCE on goods being manufactured for Brunswick.

35. That on or about September 23, 1999, Bob Guinn in accounting agreed to accelerate payments to BCE.

36. That on October 21, 1999 Brunswick was still giving it's "Come to Mexico" presentation in Taiwan even though Brunswick had already determined, analyzed and concluded that they were going to cease manufacturing in Mexico.

37. It is furthermore alleged that Brunswick, through the individuals in the Bicycle Division who had the aforementioned meeting, discussions and agreements, misrepresented to BCE the level of commitment that Brunswick had to manufacturing in Mexico. Whereas individuals had indicated there was a 15 million dollar fund to help others come to Mexico, in truth, there was not. Whereas it was represented that Brunswick had long-term commitment to Mexico of at least three years, as defined by Brunswick employees, in truth, it is alleged that Brunswick did not have such a commitment but made such representations as an inducement because Brunswick knew that suppliers would not commit to building in Mexico unless such a commitment were represented. In truth, it is alleged that Peter Larson, President of Brunswick, as of the time BCE was being induced into the relationship, had already undertaken third party appraisal of asset for write downs, and had investigated and was prepared to and taking the procedural steps and actions do all that was necessary to write down 178,000,000 in the fourth quarter of 1999 on the basis of impaired value of good will. That Brunswick Financial Committee and Chief Financial Officer along with Peter Larson, even prior to inducing BCE to come to Mexico, had already discussed, evaluated and were analyzing the exiting of the bicycle market as they had done in 1998 regarding bowling equipment which also faced effect from the Asian economic situation and where there was a charge

off of 60 million dollars for a twenty million dollar tax savings. Furthermore, the representation of along-term commitment of at least three years in Mexico was not true because Brunswick Corp through it's CEO and CFO were evaluating the Mexican operations in connection with the earning and the company prepared contingent emergency plans regarding the operation if income was not as adequate as they expected. It is alleged that the pressure from the Asian market existed on all products marketed by Brunswick and had in fact caused Brunswick to evaluate write offs of investments in the bicycle manufacturing industry as early as June of 1998. Furthermore, it is alleged that Peter Larson, the Board of Directors and the CFO had undertaken reports and analysis regarding offsetting income increases for 1999 that were in the neighborhood of three hundred thirty million dollars. That additionally, Brunswick had for some time been evaluating the divestment of the bicycle manufacturing as part of Brunswick's evaluation of its discontinuation of its out door operations, which included bicycles. During and prior to the time the promises of a "long-term" commitment was made to BCE, the Brunswick tax vice president and CEO Peter Larson were already planning on how they could write off the $190,000,000 dollar Roadmaster investment which consisted primarily of goodwill and divest from the market because of competitive pressure from Asian markets concerning all products where there was competition with Asia.

38. It is alleged that while the President of the bicycle operations was recruiting companies such as BCE to move to Mexico, Brunswick President Peter Larson and the CFO were in the process of closing the operation and writing off the investment based upon information and advice obtained from the Arthur Anderson accounting firm as part of an extensive auditing and consulting report involving the Mexican operation and the bicycle business. Even though the President of Brunswick, the CFO, Judith Zelisko, Victoria Reich and the board of directors were aware that the operation was being

divested, they allowed the bicycle division to continue in their efforts because they had to have a factual support for their write off in connection with the tax analysis of the business plan concerning feasibility and valuation. The decision to lay off 750 workers at the two plants in Mexico and 325 employees in the plant at Olney as part of the exit from manufacturing the bicycle market was evaluated, reported upon, analyzed and proposed well in advance of the notice on January 13, 2000.

39. These acts, efforts and true intention and direction of Brunswick were concealed by Brunswick Corporation from BCE . The option, the decision and the fact that Brunswick was making efforts toward this option of divestment was concealed and replaced with a misrepresentation that they were committed to manufacturing bicycles in North America for the long-term. Long-term meaning, as used by Brunswick employees and accountants, to be at least three years. It is furthermore alleged that Peter Larson, President of Brunswick, and the Board of Directors had already determined to exit the bicycle business in January of 2000, but reported publicly that Brunswick was only exiting manufacturing. This misrepresentation was made so as to avoid loss and disruption in production because suppliers could have charged any price to recover investment because Brunswick still had substantial contracts with Wal-mart that it had to meet.

40. That Peter Larson, President of Brunswick, the CFO of Brunswick and the Board of Directors knew that there was no "long-term" commitment and that the other representations identified herein regarding Mexico were not true. They also knew about competition from China. They also knew that they were evaluating the profitability of Mexico and if it was not making their expected return, that they would divest the operation, take the write off as they had done in 1998 under similar circumstances. However they also knew that unless suppliers were told there was a long-term commitment

there would be no supplier willing to build in Mexico which meant no NAFTA saving, no JIT productions and an assortment of other higher costs resulting in lower profits. Therefore the misrepresentations were allowed to see if profits could materialize and if not, to justify the write off to both tax authorities and to the stock holders.

41. BCE had no knowledge that the representations made were not true either at the time they were made or at the time of reliance upon the promises and representations by BCE. BCE also relied upon the repeated promises by Brunswick individuals of the Bicycle division, that "you can trust us." BCE had an expectation of utmost honest from Brunswick who had entered into and offered the "vender partnership" and BCE had an expectation and reliance upon Brunswick to have the level of honesty and fair dealing expected of a partner.

42. That Brunswick was economically motivated to get suppliers to move to Mexico for the reasons stated herein and that Brunswick executives Peter Larson, the CFO and the Board of Directors had an intent and a reasonable expectation that BCE and/or others would act on the misrepresentations and concealed information, described herein, such as to cause BCE and others, to detrimentally change their position by making substantial investments into Mexico for production to meet Brunswick's needs and wants.

43. That BCE was prejudiced and damaged by reliance upon the misrepresentation and/or concealment by Brunswick and "but for" the misrepresentations would not have so acted and invested millions of dollars in a production facility in Mexico.

THIRD CAUSE OF ACTION FOR QUANTUM MERRUIT AND/OR SUBSTANTIAL PERFORMANCE

(As against Brunswick Corporation and Does 1-50)

44. BCE fully performed under the agreement alleged in paragraphs 7-25 herein except for as may have been excused by the conduct of Brunswick. The factory was built after considerable investment of time, energy and money and BCE was able to and did in fact have the ability to meet the production needs of Brunswick that had been required by Brunswick.

45. BCE by so undertaking, as described herein, performed a service to benefit the defendant. In fact, only Brunswick benefited. The factory had no use other than as to meet the demands of Brunswick and it was specifically created to the needs, wants and expectations of Brunswick.

46. That BCE had an expectation in compensation for the services provided and the capital invested, and the work was not performed gratuitously.

47. As identified, in this complaint and incorporated hereat, Brunswick accepted the services and action of BCE in building a facility and operation and providing the technical know how to supplies parts needs by Brunswick for production in Mexico and meeting NAFTA and used the services for their benefit and received millions of dollars in NAFTA savings and other production savings associated with having a parts supplier in Mexico.

48. That the contract between BCE and Brunswick was an oral agreement, factually premised on express agreement as described in this complaint and incorporated thereat and such contract would exist also as implied in law because of the knowledge of the action and services by BCE and the acceptance of such services by Brunswick. It was not just the product supplied that they accepted, it was a facility built for

their practically exclusive use, technology and technique, to meet Brunswick specifications and demands. That all of the work and action was undertaken, designed, produced and made ready under the approval of Brunswick so as to be able to manufacturer parts in Mexico, on short lead times, according to Brunswick needs for their product needs for at least the next three years.

49. That should it be held that no contract exists, because of the statute of frauds, a position BCE strenuously opposes and believes legally inapplicable, that fairness and equity require the application of the doctrine of quantum Merruit and/or substantial performance entitling the plaintiff to fair and adequate compensation for the reasonable value of services and other damages as allowed by law arising from BCE actions which resulted in benefits to Brunswick of millions of dollars in tax savings, the benefit from supplying product until Mexican operations closed, the benefit in reduced lead time problems, increases in JIT performance, NAFTA and other reduced costs, and provided support of tax charge offs of $178,000,000 to receive substantial tax saving.

Fourth Cause of Action for Fraud and Deceit
(As Against Brunswick Corporation and Does 1-50 Inclusive)

50. Incorporated hereat, as though set out in full are paragraphs 1-6, 7-25, 26-43, and it is alleged that the misrepresentation regarded false statements of material past and/or existing fact as it relates to the misrepresentations: that Brunswick had, at the time of entering into the agreement and reliance, a long-term commitment to manufacturing bikes in North America for at least three years; that Brunswick had a corporate resolve and was financially prepared, at the time of entering into the agreement and reliance to deal with the global economy concerning Asian competition; that Brunswick had a 15 million dollar fund to help Asian Companies

come to Mexico; that would be a "vendor partner" with BCE, that the commitment to Mexico came from the highest ranks in the company,

51. That Defendant Brunswick, as identified in paragraphs 37 though 42, as to, at least those identified individuals, did have knowledge that the representations were being made through the reporting chain of Brunswick and communications from Jim Coninx to his superior at Brunswick Corporation. That as late as the day before the announcement was made that manufacturing operations would be closed in North American, the individuals in the bicycle division were still out attempting to recruit suppliers to come to Mexico and promising that it was a long-term commitment by Brunswick and then the investment would be justified by the business that Brunswick promised them. This misrepresentation was made for a considerable time after initiation of the decision to close the operation had begun by Peter Larson and other Brunswick executives, including, but not limited to Judith Zelisko, Victoria Reich, and consulting and auditing individuals at Arthur Anderson Company.

52. These misrepresentations, known to be false, and acts of concealment directed by executives within the company such as Peter Larson, Judith Zelisk, Victoria Reich and Jim Coninx, who as the president of the division and Chief Financial Officer, were undertaken with knowledge that the company had already made the decision to end manufacturing in North America and exit the bicycle business. These misrepresentations and acts of concealment of known fact were perpetrated in order to reduce risk and costs associated with the decision to write off the Roadmaster goodwill and also concerning risks with suppliers and/or to avoid jeopardizing Brunswick's ability to meet their outstanding contractual relationships with Walmart, Inc.

53. The acts of these identified individuals on behalf of Brunswick were done with the intent to induce BCE, and

others, to act by investing in Mexico and then the misrepresentation about only ceasing manufacturing in North America, was so that suppliers would continue producing and working with Brunswick, even though Brunswick was in truth exiting the bicycle market as part of an overall plan for divestment of the out door recreation division that had been undertaken, evaluated and commenced at a time prior to the inducement to BCE to invest in Mexico and the misrepresentations were made as alleged herein.

54. That the representations of the employees and agents identified herein made the representations based upon false information and representations conveyed by Brunswick's upper executives and management and that the bicycle division representatives identified herein, were allowed to disseminate false representations. Alternatively, as to some representations, the employee and agents of Brunswick may have been made in reckless disregard of whether they were true or false. The plaintiff further claims that the defendant made the statements with the intent to induce the plaintiff to act by making the investment in the Mexico project and the plaintiff did expend substantial time, energy and monies as a result such that the plaintiff lost several millions of dollars as a result of the reliance. Had Brunswick advised BCE of the lack of commitment, BCE could have supplied the identical product at a lower price with manufacturing occurring in China. Only Brunswick benefited by BCE investing the capital into manufacturing in Mexico and not only did Brunswick benefit in production advantages such as "just in time" ability, but also saved millions in NAFTA savings due to the products manufactured by the plaintiff which enabled the defendant to meet NAFTA requirements.

55. BCE further claims that they reasonably believed the statements and in justifiable reliance on the truth of the statements by the employee agents, Kevin Kabbes, Bob Guinn, James Connix, and Howard Atkenson and others who

made the representations alleged herein and incorporated in full hereat, especially since the characterization of the agreement as a "partnership" was from Brunswick. BCE had a right and expectation to receive that level of utmost honesty associated with a representation and agreement by Brunswick that they were "vendor-partners" as alleged herein, and incorporated hereat.

56. The misrepresented condition was an essential element to the transaction between BCE and Brunswick and, "but for" the misrepresentations, BCE would not have committed to the project or invested the time, energy and resources to the. Mexican project.

57. BCE alleges that there was a special relationship of trust between BCE and Brunswick created out of the "vender/partnership" agreement. Furthermore, Brunswick had a duty to not conceal material and relevant information as identified herein because of the partnership agreement.

58. It is alleged that BCE did knowingly conceal from and/or withhold from the plaintiff the facts generally stated regarding the Defendant Brunswick's true level of commitment to the Mexican project which was substantially different than that communicated to plaintiff and others to get inducement and reliance on the project and to invest time, energy and money as plaintiff did resulting in millions of dollars of losses when Brunswick exited the manufacture of bicycles. BCE furthermore claims that Brunswick concealed and/or withheld the fact(s) with the intent to deceive the plaintiff and to induce BCE to make a commitment to the vendor/partnership agreement investing considerable time, energy and money into developing an operation in Mexico to further Brunswick's financial plan and objectives. BCE furthermore alleges that BCE did in fact did undertake a substantial commitment of time, energy and commitment to the Mexican manufacturing project of defendant Brunswick Corporation in justifiable reliance upon the facts as they knew

them and as they were communicated and represented by the corporate defendant Brunswick Corporation through its agents as identified herein and incorporated hereat.

59. The plaintiff further claims that they sustained damages as a result of the concealment and/or withholding of (a) material fact(s) by the Brunswick.

60. As a result of the misrepresentations and concealment by Brunswick, BCE suffered damages as stated herein and as to be provided and amended hereafter and that the conduct of Brunswick was willful and wanton, violated the trust and/or confidence of BCE and that BCE is entitled to an award of exemplary damages in an amount that will serve to punish Brunswick and to deter Brunswick and others from similar conduct.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. General damages, according to proof and within jurisdictional limits of this Court;
2. Punitive damages in an amount to be determined by the trier of fact;
3. Damages for cost of suit incurred herein;
4. Prejudgment interest, according to proof; and
5. Such other relief as this Court deems just and proper.

DATED: October 10th, 2002.

/s/ Steven A. Leahy
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Specially Appearing Pro Hac Vice

State of Illinois)

CERTIFICATE OF ATTORNEY

I, the undersigned, a licensed attorney in the state of Illinois, state that I caused a copy of the foregoing "Plaintiff's Second Amended Complaint" to be served upon:

Mr. David J. Chizewer
Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603

by enclosing a true and correct copies of same in a properly addressed stamped and sealed envelope and by depositing in a U.S. Mail Chute at 150 North Michigan Avenue, Illinois 60602, at or before 5:00 p.m. this 10th day of October, 2002. I declare under penalty of perjury that the forgoing is true and correct. Executed this October 10, 2002.

/s/ Steven A. Leahy
STEVEN A. LEAHY

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